BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERTO RIOS	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,653
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier have appealed from an Amended Award entered by Administrative Law Judge Jon L. Frobish on June 24, 1996. The Appeals Board heard oral argument on December 19, 1996.

APPEARANCES

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James H. Morain of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Rebecca W. Crotty of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Amended Award and has adopted the stipulations listed in the Amended Award.

ISSUES

Respondent asks the Appeals Board to review the decision by the Administrative Law Judge that claimant has an 86 percent permanent partial general disability and the determination that Kansas Workers Compensation Fund has no liability in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that claimant is entitled to benefits based upon a 74 percent work disability. The Appeals Board also finds that respondent has not established a basis for imposing liability upon the Kansas Workers Compensation Fund. All of the award is the responsibility of respondent and its insurance carrier.

The injury at issue in this case is the second of two bilateral upper extremity injuries. The first injury occurred in 1991 while claimant was working for respondent. Claimant had worked for respondent since 1987 as a meat trimmer and box stacker. After the injury in 1991, he performed maintenance or janitorial work.

For the 1991 injuries claimant was awarded benefits for a 12 percent permanent partial general functional disability. The Award by the Administrative Law Judge was affirmed by the Appeals Board and the claim was later settled.

From the 1991 injuries, Guillermo Garcia, M.D., the treating physician, diagnosed bilateral carpal tunnel syndrome and recommended that claimant not perform hook or knife work, and that he limit his repetitive motions with his right hand. Respondent accommodated those restrictions by placing claimant in a position performing janitorial work. Claimant performed the janitorial work without further incident until April 1994, when he began noticing more severe new problems in both hands with pain radiating in his forearms. Claimant continued to work while seeing E. Estrada, M.D.; M. Bergeron, M.D.; and Pedro A. Murati, M.D. Ultimately, Dr. Murati placed the restrictions upon claimant which respondent indicated it could not accommodate. Dr. Murati diagnosed unresolved left ulnar cubital syndrome and unresolved right carpal tunnel syndrome. Claimant's last date of work for respondent was March 20, 1995.

Respondent first argues that there is no new disability from the current injury as compared to the 1991 injuries. The Appeals Board disagrees. First, claimant's testimony indicates his injuries worsened. In addition, Dr. Murati's restrictions are, in our review, more restrictive. As previously indicated, Dr. Garcia recommended, and respondent accommodated, restrictions prohibiting him from doing hook and knife work and repetitive activities with his right hand. Dr. Murati has now recommended that claimant be limited to

lifting 20 pounds occasionally and 10 pounds frequently. He recommended claimant not reach above the shoulder more than occasionally and with never more than 10 pounds. He restricted claimant's bending and stooping, restricted climbing ladders to occasionally and crawling frequently, and restricted claimant's repetitive arm movements and repetitive work to only frequently. Finally, the restrictions by Dr. Murati were the ones which in 1995 respondent ultimately could not accommodate. Respondent had been able to accommodate the prior restrictions by Dr. Garcia. The Appeals Board notes that both Dr. Ernest R. Schlachter and Dr. C. Reiff Brown, had imposed restrictions in 1991. While these restrictions were more nearly in line with those ultimately recommended by Dr. Murati, respondent accommodated claimant based upon the restrictions of Dr. Garcia, not those of Dr. Schlachter or Dr. Brown.

Respondent also argues that the Award entered by the Administrative Law Judge improperly accounts for claimant's 1991 injuries. The Administrative Law Judge gave credit under K.S.A. 44-510a for benefits paid under the previous claim tried under Docket No. 168,755. In effect, the Administrative Law Judge allowed credit for all of the amount paid in permanent partial disability benefits, crediting a total amount of $10,201.95. The total award in that case was $12,300.95 of which $2,099 was for temporary total disability benefits.

The Appeals Board first notes that, even if credit were to be awarded pursuant to K.S.A. 44-510a, the credit should not be for the full amount of the prior award. The credit would be only for the weeks during which the first award overlaps with the second. For the reasons given below, however, the Appeals Board concludes the credit under K.S.A. 44-510a is not appropriate.

Respondent argues that it should also be entitled to the benefit of amendments to K.S.A. 44-501(c) which provides in pertinent part as follows:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Based upon these provisions, respondent argues that claimant should be entitled to recover only for the increased disability as a result of the 1995 injury. Specifically, respondent argues that the Administrative Law Judge has improperly calculated the task loss component of work disability.

This work disability is defined in K.S.A. 44-510e as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee

> performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Respondent first argues that claimant has suffered no additional loss of task performing ability from the 1995 injury as compared to the 1991. In support of this argument, respondent offers the testimony of Ms. Karen C. Terrill. Ms. Terrill interviewed claimant and obtained a list of job tasks which she also verified with the employers. From her analysis, the restrictions imposed or recommended by Dr. Garcia in 1991 would have eliminated certain tasks, and she concluded that restrictions by Dr. Murati in 1995 did not eliminate any additional tasks.

The Appeals Board finds Ms. Terrill's testimony, on this point, unconvincing for two reasons. First, the cross examination of Ms. Terrill, at the time of her deposition, suggests she did not, in all instances, rely on accurate information on what tasks were involved. Second, the position taken by Ms. Terrill is directly contradicted by the decision of respondent that it could not accommodate the restrictions by Dr. Murati when it had been accommodating the restrictions by Dr. Garcia. Respondent considered the restrictions by Dr. Murati to render claimant unable to perform the janitorial duties he was performing in the accommodated work after the 1991 injuries.

Respondent next argues that even if the Appeals Board does not adopt this conclusion by Ms. Terrill, the Appeals Board should then adopt a methodology which takes into consideration the opinion of Mr. Jerry D. Hardin that the 1991 restrictions by Dr. Garcia would have eliminated 52 percent of claimant's ability to perform tasks. Mr. Hardin also ultimately concluded that, after the 1995 injuries, claimant had lost the ability to perform 71 percent of the tasks he had performed during the 15 years preceding the 1995 injuries. According to respondent, the Appeals Board should, therefore, find that claimant has suffered a loss of only an additional 19 percent based upon the opinions of Mr. Jerry Hardin.

The Appeals Board first notes that Mr. Hardin's opinion appears to be an opinion that the restrictions by Dr. Garcia would have eliminated claimant's ability to perform 52 percent of the tasks he had performed prior to the 1991 injuries. It is not an opinion that the restrictions by Dr. Garcia would have eliminated 52 percent of all of the tasks claimant performed prior to the 1995 injuries. In addition, the Appeals Board concludes that, under the circumstances presented here, the provisions of K.S.A. 44-501 should be implemented by deducting the amount of the prior award, 12 percent disability. The provisions of K.S.A. 44-501 should not be implemented by recalculating the task loss component of work disability. In this case, the extent of claimant's prior disability has been judicially determined to be 12 percent. Even though claimant may have had restrictions from the 1991 injuries, they were not utilized to determine the extent of disability because claimant had returned to work at a comparable wage. As a result, there was a presumption that

claimant had no work disability. The presumption was not overcome by any evidence presented, and the decision was made that claimant had a 12 percent general body disability.

K.S.A. 44-501 now indicates that claimant should be entitled to recover only to the extent of the increase in disability. The Appeals Board understands this statement to mean, under these circumstances, that claimant is entitled to recover to the extent there is an increase over and above the 12 percent disability previously determined. This reading also satisfies the provisions of K.S.A. 44-501 which requires that the extent of any award be reduced by the amount of functional impairment determined to be preexisting. The Appeals Board notes that, in cases involving a judicially determined prior disability, the extent of that disability so determined should be used when determining the extent of increased disability for purposes of K.S.A. 44-501.

Finally, respondent argues that the Administrative Law Judge improperly excluded the opinions of Ms. Terrill regarding task loss. The Administrative Law Judge noted K.S.A. 44-510e requires that the task loss opinion be stated in the opinion of the physician. The Administrative Law Judge made a finding that the only opinion in evidence was that of Mr. Hardin, supported by the testimony of Dr. Murati. Respondent argues that Dr. Murati also approved the opinion of Ms. Terrill. The Appeals Board disagrees with this argument. First, Ms. Terrill had made two different listings of tasks, one based upon the claimant's description and another based upon the employer's description. The record does not indicate which of those lists Dr. Murati was reviewing at the time of his deposition. Second, it appears that Dr. Murati assumed that the oil field work involved weights of less than 20 pounds. Claimant has testified that some of that work involved lifting significantly heavier weights. Finally, in the reviewing of the task list, the record is not clear that Dr. Murati has reviewed all of the tasks identified in Ms. Terrill's report. As an example, when asked about cleaning the locker rooms, the question was posed simply as a description of the next item on the list with the doctor affirming that it is the next item.

The testimony is:

> "Q: And then we have clean the locker rooms, sweep and mop.
>
> A: Yes."

In summary, Dr. Murati's testimony comes close to allowing the Board to make its own calculation based upon Dr. Murati's review of Ms. Terrill's list of tasks. The Appeals Board finds, however, that in the end it falls short of allowing the Board to do so. Ms. Terrill's opinion, standing only, does not satisfy the requirements of K.S.A. 44-510e.

The only physician's opinion in evidence was the opinion Dr. Murati based on Mr. Hardin's task list. The opinion was that claimant had lost the ability to perform 71 percent of the tasks that he performed in the fifteen-year work history preceding the date

of accident. The Appeals Board notes Mr. Hardin has calculated this percentage by figuring the percentage of tasks lost in each of eight jobs. He then added the percentages for each job and divided by eight. Because there are not the same number of tasks in each job, this yields a result slightly different than if one figures the percentage by comparing the total number of tasks claimant can no longer perform with the total number of tasks performed. In this case, the number of tasks in each job was very similar and, in our opinion, the difference in methods is inconsequential. As a result the Appeals Board agrees with and adopts the opinion by Dr. Murati, based on Mr. Hardin's report that claimant has lost the ability to perform 71 percent of the tasks performed in his fifteen-year work history.

The record indicates claimant was not working at the time of the last evidence presented. The wage loss is, therefore, 100 percent. When the wage loss and task loss are averaged, the result is an 86 percent permanent partial general disability. Since claimant had a 12% preexisting disability, the award should be for the additional 74 percent disability.

The Appeals Board also agrees with the decision by the Administrative Law Judge finding no liability on the part of the Kansas Workers Compensation Fund. Claimant has an injury resulting from a repetitive trauma and he left his employment with respondent as a result of that injury. In accordance with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d, 220, 885 P.2d 1261 (1994), claimant's last day at work should be treated as the date of accident. Claimant's last day of employment was March 20, 1995. The Kansas Workers Compensation Fund, pursuant to amendments effective July 1, 1993, has no liability for injury occurring after July 1, 1994. *See* K.S.A. 44-567(a)(1).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Amended Award entered by Administrative Law Judge Jon L. Frobish dated June 24, 1996, should be modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alberto Rios, and against the respondent, National Beef Packing Company, and its insurance carrier, Wausau Insurance Companies, for an accidental injury which occurred March 20, 1995, and based upon an average weekly wage of $341.63 for 307.10 weeks at the rate of $227.76 per week for a 74% permanent partial work disability, making a total award of $69,945.10.

As of March 31, 1997, there is due and owing claimant 106 weeks of permanent partial disability compensation at the rate of $227.76 per week in the sum of $24,142.56,

which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $45,802.54 is to be paid until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
James H. Morain, Liberal, KS
Rebecca W. Crotty, Garden City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director